**U.S. Department of Justice**

*United States Attorney*
*Southern District of New York*

*The Silvio J. Mollo Building*
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*New York, New York 10007*

September 17, 2016

**BY ECF**

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

**Re: United States v. Gary Hirst,**
**15 Cr. 643 (PKC)**

Dear Judge Castel:

The Government writes in opposition to the defendant's request that the Court instruct the jury on two purported principles of Cayman Islands law. As an initial matter, no such legal instruction to the jury is required because the proffered points of Cayman law are irrelevant. Ultimately, Hirst's actions in this case are being judged under principles of United States law and there is no evidence in the record that Hirst relied upon, or was even aware of, the principles of Cayman law on which he now seeks to instruct the jury. The irrelevance is particularly apparent with respect to the second principle of Cayman law on which Hirst seeks to instruct the jury, regarding the powers of signatories under Cayman law, because the specific accounts at issue in this trial from which money was transferred were U.S. bank accounts of Cayman entities associated with Hirst. Bank accounts in the United States are governed by United States law, not Cayman law, even if those accounts are owned by entities domiciled in the Cayman Islands. In any event, before any instruction in Cayman law should be given, a hearing under Fed. R. Crim. P. 26.1 outside the presence of the jury is necessary in order for the Government to cross-examine the proffered expert and test the limits of the Cayman legal principles he is propounding.

## Background

As Your Honor is aware, on August 23, 2016, Hirst provided the Government notice that he intended to call Jan Golaszewski, Esq. of Carey Olsen Cayman Limited as a witness at trial. Hirst's notice as to Golaszewski read, in full, that Golaszewski would testify "regarding the law of the Cayman Islands as it relates to Gerova's Articles of Association and corporate governance." The Government advised Hirst that it believed this notice was deficient under Fed. R. Crim. P.

16(b)(1)(C)(i) because it did not "describe the witness's opinions, [and] the bases and reasons for those opinions" as required by that Rule.

On September 2, 2016, Hirst supplemented his initial disclosure. His amended disclosure as to Golaszewski read, in full:

> [Golaszewski] will testify concerning the law of the Cayman Islands as it relates to Gerova's Articles of Association, the constitution and operation of Gerova's Board of Directors, the interpretation of various Gerova board resolutions, the interpretation of the contract governing the relationship between Gerova and its transfer agent, and the interpretation of certain other Gerova agreements. In particular, we anticipate that Mr. Golaszewski will offer his opinion that under the board resolutions operative at the time and the law of the Cayman Islands as applied to these resolutions, Gerova's directors, and in particular Mr. Hirst, were legally authorized to execute documents such as the Ymer Shahini warrant agreement and to instruct CST to issue shares on behalf of the company without prior board approval.

On September 6, 2016, the Government again wrote to the Court, contending that Hirst's disclosure under Fed. R. Crim. P. 16(b)(1)(C)(i) as to Golaszewski's potential testimony was deficient because it did not adequately disclose the bases for Golaszewski's opinion that, under Cayman Islands law, "Gerova's directors, and in particular Mr. Hirst, were legally authorized to execute documents such as the Ymer Shahini warrant agreement and to instruct CST to issue shares on behalf of the company without prior board approval." Hirst supplemented his expert disclosure on September 8, 2016, and identified various sources that Golaszewski considered in reaching his conclusion, but still did not identify the "bases and reasons," Fed. R. Crim. P. 16(b)(1)(C), for Golaszewski's opinion.

On Monday, September 12, 2016, prior to the commencement of trial, this Court addressed the Cayman Islands law issue and directed as follows:

> If there is any point of law, Cayman Islands law, in which you wish the Court to charge the jury, because an issue of foreign law is for the Court, then what I will require you to do is submit the proposed instruction together with an affidavit from your foreign law expert as to the basis in foreign law for them. Now, if you choose to go the route you have gone of simply saying, here's a treatise, it's somewhere in here, I doubt you will persuade the Court of the validity of your point of Cayman Islands law. You have some burden of persuasion on the point of Cayman Islands law that you wish to have me charge the jury. So it won't be enough, because if somebody comes into my courtroom and says, oh, I'm entitled to do this, where is it, it's in the Federal Rules of Evidence, I don't find that argument very persuasive, and I doubt I will find your expert's

> argument persuasive. So I will require that by the end of the day on Wednesday.

On Wednesday, September 14, 2016, the defendant filed a letter seeking that the Court include in its instructions to the jury the following two instructions regarding Cayman Islands law:

1) Under Cayman Islands law, absent an explicit prohibition in a company's Articles of Association, an action taken by an individual director without prior authorization of the Board of Directors may be ratified retroactively by vote of the full Board.

2) Under Cayman Islands law, a signatory on a bank account has no beneficial ownership over the funds in such an account simply by virtue of his status as a signatory.

Attached to the defendant's letter was an affidavit from Samuel Martin Pierce Dawson, a partner in the Litigation and Insolvency Department of the Cayman Islands law firm Carey Olsen Cayman Limited, discussing the relevant issues of Cayman Islands law and providing citations to various legal sources. Notably, Mr. Dawson is not the individual the defendant seeks to call as a witness at trial.[1]

## Discussion

### I. The Principles of Cayman Law on which Hirst Seeks to Instruct the Jury Are Irrelevant

Hirst's proposed legal instruction regarding board ratification of individual director action is legally irrelevant and is thus both improper and likely to lead to jury confusion. The Government's Indictment in this matter does not allege that Hirst is guilty of the charged offenses because he in some way violated Cayman law. Nor is it in any way a defense to the charged offenses that Hirst's conduct complied with Cayman law. The jury in this case is *not* being asked to assess whether Hirst's conduct complied with Cayman law and insertion of Cayman law issues into the Court's legal instructions has a significant potential to lead to jury confusion. The irrelevance of Cayman law is apparent given there is no evidence in the record that Hirst was either aware of or that he relied upon Cayman law in fashioning his conduct. The defendant does not appear to intend to offer any evidence that he consulted a Cayman Islands lawyer, was aware of the relevant provisions of Cayman Islands Law or relied upon such law. Thus, the strictures and principles of Cayman law are entirely irrelevant to whether Hirst had the requisite knowledge and intend to commit the charged offenses under U.S. law. Indeed, any instruction on this topic is likely to confuse the jury and to leave them with the misimpression that board ratification could absolve the defendant of criminal liability.

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[1] An affidavit from someone other than the witness who will actually testify at trial is facially deficient. There is no reason, in today's electronic age, that travel alone should render a witness unable to submit the sworn affidavit requested by the Court. An affidavit by someone other than the testifying witness is a useless tool of cross-examination because the statements contained therein are not statements that can be attributed to the actual witness and thus cannot be used to test the veracity or knowledge of the actual witness.

The irrelevance of Hirst's proposed legal instructions on Cayman law is readily apparent in his proposed instruction on Cayman signatory law, which in no way will be an issue at this trial. The Government expects that the proof at trial will establish that on June 22, 2010, approximately $2.6 million was wired from Ymer Shahini's brokerage account at the brokerage firm CK Cooper to a bank account of an entity called the Taurus Global Opportunities Fund ("Taurus"), which was held at the Vensure Federal Credit Union ("Vensure"), a credit union based in Mesa, Arizona that was regulated by U.S. authorities (and on whose board Hirst served for a period of time). That same day, the $2.6 million was wired from Taurus's U.S. bank account to a U.S. bank account in the name of Pennine Investors Ltd. ("Pennine") also maintained at Vensure, and then to a Swiss Bank account. Documentary evidence, including account opening documents, will establish that Hirst was listed as a "Joint Owner" and signatory on both the Taurus and Pennine accounts at Vensure and that Taurus and Pennine were both Cayman Islands entities. The evidence at trial will further establish that Hirst directed and caused the wire transfers from Taurus to Pennine and from Pennine to the Swiss Bank account.

Bank accounts domiciled in the United States – even those of foreign entities – are governed by United States law. The Government is aware of no evidence regarding transfers made from Cayman accounts that will be at issue in this trial. As such, Cayman law governing signatories is entirely irrelevant to this trial. Transfers from the U.S. bank accounts of Hirst's Cayman Islands entities – Taurus and Pennine – are, quite simply, governed by United States, not Cayman Islands, law.

## II. A Hearing is Required to Test the Bounds of the Principles that Hirst's Proffered Expert is Expounding

If the Court is nonetheless inclined to instruct the jury on Cayman Islands law, a hearing outside the presence of the jury should be held pursuant to Fed. R. Crim. P. 26.1 in order for the Government to test the limits of the principles being articulated. For example, the first legal principle about which Hirst wishes the Court to instruct the jury – that a board may ratify an individual director action after the fact – is akin to a principle of U.S. law, but leaves out certain key components of the comparable U.S. legal principle. In the United States, the validity of *post hoc* ratification depends on several factors beyond the mere director vote, including most importantly full disclosure of all material facts. *See, e.g.*, *Loudon* v. *Archer-Daniels-Midland Co.*, 700 A.2d 135, 140-41 (Del. 1997) ("[T]he party relying on ratification as a defense has the burden of demonstrating full and fair disclosure."). The validity of ratification in the United States also depends on the absence of fraud. *See, e.g.*, *Stroud* v. *Grace*, 606 A.2d 75, 82 (Del. 1992) ("Under Delaware law a fully informed shareholder vote in favor of a disputed transaction ratifies board action in the absence of fraud."). The Government should be able to cross-examine Hirst's proffered experts about whether these principles similarly constrain Cayman law and whether the expert is contending that ratification, even in the presence of fraud or in the absence of full disclosure, is valid under Cayman Islands law. Without Government testing of the outer limits of the principles of Cayman law that Hirst's expert is proffering, the Court may erroneously instruct the jury on a principle of Cayman law that is too broad is its current articulation. In fact, the potentially absent principles are exactly what is at issue in this trial – whether the Shahini share issuance was fraudulent or made in the absence of fraud, and whether all material facts about the Shahini share issuance were disclosed to the board in advance of the ratification vote. A misstatement of Cayman law on this issue therefore has a significant potential to confuse the jury or otherwise lead it astray.

Further, the affidavit submitted in connection with Hirst's requested legal instruction indicates that the question posed to the proffered expert was whether "Under Cayman Islands law, it is permissible for a director to act individually without prior authorization of the board of directors, *so long as the act taken is in the best interests of the company* and is ratified after the fact by the board of directors." (Dawson Aff. at pg. 3) (emphasis added). The Government should be allowed to test whether the expert's conclusion regarding the validity of ratification changes if the action put up for ratification was one that was *not* in the best interest of the company. Without exposing the expert's conclusions to adversarial testing, the validity of the proffered conclusions cannot appropriately be ascertained by the Court.

Similarly, to the extent the Court were not inclined to preclude instruction on Cayman signatory law on relevance grounds, the Government would wish to test, in a Rule 26.1 hearing, the limits of the principles articulated.[2]

Respectfully submitted,

PREET BHARARA
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[2] Prior to any such hearing, the Court should require Hirst to produce an affidavit from the witness he actually intends to call at the hearing and/or at trial.